5-7-2009

Villa Highlands, LLC v. Western Community Ins. Co. Appellant's Reply Brief Dckt. 35472

IN THE SUPREME COURT OF THE STATE OF IDAHO

VILLA HIGHLANDS, LLC, an Idaho limited liability company,

Plaintiff-Appellant,

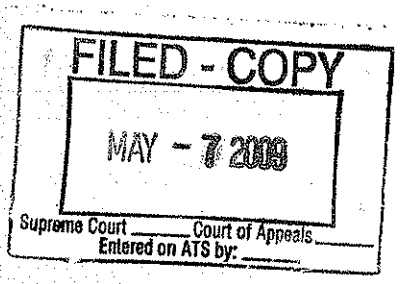
v.

WESTERN COMMUNITY INSURANCE CO., an Idaho corporation; FARM BUREAU INSURANCE COMPANY OF IDAHO, an Idaho corporation; DALE E. ZIMNEY, an individual; and DOES I-V,

Defendants-Respondents.

SUPREME COURT NO. 35472

Ada County Case No. CV OC 0621175



APPELLANT'S REPLY BRIEF

On Appeal from the District Court of the Fourth Judicial District

of the State of Idaho, in and for the County of Ada

The Honorable Darla Williamson, District Judge, Presiding

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Regulations and Rules

I. RESPONSE TO RESPONDENTS' STATEMENT OF FACTS

In response to Respondents' "facts" setting forth what occurred with respect to the appraisal process from 2006 through 2008,[1] the correspondence and documentation associated with what occurred during that time frame speaks for itself and is included in the Augmentation Record on appeal, attached to the Affidavit of Cynthia Yee-Wallace in Support of Plaintiff's Motion for Relief from Judgment and the Affidavit of William Hodges in Support of Plaintiff's Motion for Relief from Judgment.[2] (Respondents' Brief at 6). Respondents summarize facts and

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[1] Two central themes emerge from Respondents' "Statement of Facts:" (1) that it is Villa Highlands' fault that it is purportedly underinsured in this case; and (2) that Villa Highlands stalled the appraisal process. However, the record before the Court on appeal establishes Villa Highlands' response to these themes. Had Respondents followed the terms of the builder's risk policy in determining if Villa Highlands was underinsured, the parties may not have been engaged in litigation over the policy. Further, the record adequately sets forth precisely what occurred during the course of the appraisal process, including the actions of Western Community in continually inflating the appraisals used to determine underinsurance in this case in an effort to find that Villa Highlands was underinsured. Respondents' conduct allowed them to avoid paying Villa Highlands the full amount due to it under the terms of the policy.

[2] At the outset of Respondents' "Statement of the Facts," they object to Villa Highlands' Statement of Facts on the grounds that it "contains information irrelevant to this appeal, mischaracterizes the record, contains unsupported assertions that are contrary to the record, and obfuscates the proper chronology of events." (Respondents' Brief at 2). Respondents did not provide any specific citations or references which show that Villa Highlands has mischaracterized or obfuscated the record. (*Id.*) Instead, Respondents argue that, as an example, "the reasons as to why the Villa Highland building was inadequately insured by the Appellant is not an issue currently before the Court on appeal." (*Id.*) Respondents go on to discuss this very issue and imply that it is in fact Villa Highlands' fault that it was not adequately insured in this case and they allude to their reasons why they believe this to be true. (*Id.* at 3-6). In any event, the reasons as to how Respondents determined that Villa Highlands was underinsured under the builder's risk policy is particularly pertinent to this appeal. Additionally, how the insurance policy was procured and how the limit of insurance was determined are also relevant to the background of this case.

Moreover, it is in fact Western Community that makes unsupported citations to the record. For example, Respondents describe how they calculated the loss in this case. The loss was calculated with a spreadsheet and used $7,160,000 as the estimated value of the building on the

present extensive argument in their "Statement of Facts" which does not necessarily reflect the actual record in this case. Thus, instead of rebutting every single inaccurate point raised by Respondents, Villa Highlands will highlight these inaccuracies in responding to Respondents' arguments below.

II. REPLY

A. The Record Clearly Demonstrates that Western Community was Put on Notice of Villa Highlands' Breach of Contract Claim.

Western Community first argues that there was no breach of contract action against it because the parties entered into a Stipulation Re: Villa Highlands Appraisal ("Stipulation") on January 17, 2008 and that the effect of such "was that there was no longer any dispute between the parties as to whether Western Community had paid the claim according to the dictates of the Policy." (*See* Respondents' Brief at 20; *see also* COE 7, Ex. C). Western Community goes on to argue that this Stipulation confirmed that the $3,127,207 paid by Western Community "fully satisfied its burden under the Policy," and states that this is reflected in the Second Amended Complaint. (Respondents' Brief at 20). Respondents also state that Villa Highlands "voluntarily dismissed" its claim for beach of contract directly with Western Community. (*Id.*) However, Respondents' arguments defy the record in this case and are neither persuasive nor responsive to the controlling authority governing notice pleading in this State.

Count Four of the Second Amended Complaint, which was filed after the parties entered into the Stipulation, sets forth a short and plain statement for breach of the insurance contract

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date of completion. (COE 11, Ex. A). Respondents state that this figure was "presented by Villa Highlands" and was the amount reflected in the lender's (First Horizon's) March 15, 2005 appraisal. (*See* Respondents' Brief at 6). However, this figure is no where to be found in the First Horizon March 15, 2005 appraisal. (*See* COE 17, Ex. N).

showing that Villa Highlands is entitled to relief. *See e.g. Seiniger Law Office, P.A. v. North Pacific Ins. Co.*, 145 Idaho 241, 246, 178 P.3d 606, 611 (2008) (citation omitted) *and see* I.R.C.P. 8(a)(1). The only contract discussed in Count Four is the builder's risk policy at issue in this case.' (R. Vol. I, pp. 176-177). Paragraph XXVII of Court Four states that:

> Based upon Zimney's apparent authority, Western Community and/or Farm Bureau are bound by his representations concerning the subject policy *and failing to tender the amount due arises to a breach of contract.*

(R. Vol. I, p. 177) (emphasis added). Paragraph XXVIII goes on to state that "*As a direct result of Western Community's* and/or Farm Bureau's *breach of contract*, Villa Highlands has suffered substantial *damages* in excess of $10,000, *which amount will be proven at trial.*" (*Id.*) (emphasis added). This language sets forth that Western Community breached the builder's risk policy and that it was liable, in damages, to Villa Highlands as a direct result of its breach. Additionally, the language in Count Six and the prayer for relief in the Second Amended Complaint clearly reveals that Villa Highlands was alleging that Respondents had not satisfied their obligations under the builder's risk policy. (R. Vol. I, pp. 178-179, 181-182).

Moreover, Western Community's Answer to the Second Amended Complaint also evidences that Respondents were on notice of Villa Highlands' breach of contract claim. (*See* R. Vol I, pp. 170-182). Again, a party's response to a complaint can be sufficient to demonstrate that said party has been put on notice of a plaintiff's claims. *See Seiniger Law Office, P.A.*, 145 Idaho at 247, 178 P.3d at 612 (citing *Vendelin v. Costco Wholesale Corp.*, 140 Idaho 416, 427, 95 P.3d 34, 45 (2004) and *Zattiero v. Homedale Sch. Dist. Number 370,* 137 Idaho 568, 572, 51 P.3d 382, 386 (2002)). Conveniently, Respondents do not once discuss or mention their Answer to the Second Amended Complaint anywhere in their appellate brief. (*See* Respondents' Brief).

This is because the language in their Answer is telling and persuasively establishes that Western Community was on notice of a claim for breach of the builder's risk policy in this case.

Respondents filed their Answer to the Second Amended Complaint on January 29, 2008, thirteen days after their counsel signed the Stipulation.[3] (R. Vol. I, p. 183 and COE 7, Ex. C). If Western Community truly believed that the Stipulation resolved the dispute regarding whether Western Community had properly paid Villa Highlands' claim and confirmed that Western Community had fully satisfied its burden under the policy, its Answer to the Second Amended Complaint does not reveal this belief. In fact, Respondents' Answer to the Second Amended Complaint reveals the exact opposite. Respondents' Third, Fourth, Sixth, Ninth, Twelfth, Fourteenth, Fifteenth, and Sixteenth affirmative defenses all discuss or relate to defenses against a written breach of contract claim. (*See* R. Vol. I, pp. 186-188). Further, Respondents' Answer to the Second Amended Complaint does not even mention the Stipulation, which could have been pled as a defense, but was not. Moreover, Respondents' summary judgment briefing (filed in March of 2008) outlines that there remained a dispute over the amount paid to Villa Highlands and that there was an amount currently being demanded by Villa Highlands under the policy. (COE 10 at 8). In short, the Stipulation did not resolve all of the issues between Villa Highlands and Western Community, including the breach of contract claim.

Western Community next sets forth its interpretation of the Second Amended Complaint, arguing that Court Four is not aimed at a claim based on the builder's risk policy but instead

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[3] And, again, the district court ruled that Paragraph 1 of the Stipulation was irrelevant for purposes of interpreting the builder's risk policy in this case. (Tr. April 9, 2008, p. 73, L. 7-15, pp. 81-83). Thus, to now imply that this Stipulation, as a whole, has some total binding effect in this case is an inappropriate argument on appeal, because the district court's ruling in this regard has not been challenged on appeal.

refers to the "alleged contract formed by Zimney's representations under Count One of the Second Amended Complaint and not the insurance policy itself." (Respondent's Brief at 21). This argument is simply not genuine. Count One for breach of contract was asserted against Dale Zimney whereby Villa Highlands alleged that Dale Zimney breached an oral contract to procure full and complete insurance coverage for Villa Highlands. (R. Vol. I, pp. 173-174 and COE 16 at 9-13). Clearly, Western Community was aware that the contract at issue in Count Four was the builder's risk policy, and not the contract alleged in Count One. (*See* R. Vol. I, pp. 185).

Paragraphs VI through XII of the Second Amended Complaint set forth Count One for breach of contract against Dale Zimney. (R. Vol. I, pp. 173-174). In Western Community's Answer to the Second Amended Complaint, Respondents specifically stated that "the allegations contained in Paragraphs 6 through 21 are not directed to either Defendant Western Community or Farm Bureau, these answering Defendants are not required to answer such allegations and, on that basis, deny the same." (R. Vol. I, p. 185, ¶ V). This language alone directly contradicts the position argued in Respondents' Brief in this matter and their crafted interpretation of the Second Amended Complaint.

Western Community next argues that its summary judgment briefing reflected its understanding that Count Four did not address a direct breach of contract claim on the insurance policy, but was one for vicarious liability. (Respondents' Brief at 22). Although it is true that Western Community argued that it should not be held vicariously liable for a breach of contract claim, its argument was primarily focused on the position that Villa Highlands' claims were not properly for breach of contract, but for negligence against Dale Zimney. (*See* COE 10 at 15). However, when Villa Highlands responded to Respondents' motion for summary judgment, it

asserted that Respondents were liable for their own breaches of the builder's risk policy. (COE 15 at 25). Respondents did not respond to Villa Highlands' assertion. (*See* COE 26). Further still, regardless of what Western Community may have argued in its summary judgment brief, Respondents cannot ignore what was asserted in their Answer to the Second Amended Complaint, which clearly denotes that they were on notice of a claim for breach of the insurance contract in this case.

Respondents also argue that "from the time Villa Highlands executed the Stipulation at issue until the time of Perkins Coie's involvement in this case, Villa Highlands never undertook any efforts to procure discovery regarding a direct breach of contract claim against Western Community or otherwise prepare such claim for trial." (Respondents' Brief at 24). Respondents fail to cite any basis for this statement and no such basis exists in the appellate record. Curiously, Respondents subsequently acknowledge that the contrary was, in fact, true. At page 41 of their brief, Respondents reply to Villa Highlands' arguments regarding the district court's denial of Villa Highlands' motion to compel Western Community's underwriting file information via 30(b)(6) depositions. Clearly, discovery related to underwriting file information is directed to how an insurance carrier analyzes and rates an insured's property, including valuation of the property at the time the policy was written. Respondents' suggestion that Villa Highlands did not pursue any discovery related to a breach of contract claim is patently false. Unfortunately, the district court prevented Villa Highlands from obtaining this information.

The language of the Second Amended Complaint and Respondents' Answer to the Second Amended Complaint establish that Respondents were on notice of a claim for breach of the builder's risk policy in this case. The language in these pleadings also demonstrate that Villa Highlands did not somehow "voluntarily dismiss" or "abandon" its breach of contract claim.

(*See* Respondents' Brief at 20, 23, 24, 25). Respondents fail to cite any authority in support of their references that Villa Highlands dismissed or abandoned its breach of contract claim and do not even respond to or cite any authority addressing notice pleading in this State. Instead, Respondents present various arguments aimed at distracting the Court from the controlling authority in this case and the language of the relevant pleadings at issue. The district court erred in ruling that Court Four did not state a cause of action for breach of the insurance policy in this case and its decision should be reversed and remanded for a new trial on this issue.

B. Count Six was not Moot, the District Court did not Fully Adjudicated Count Six, and the Issues Raised at Trial had no Impact on Villa Highlands' Ability to Fully Adjudicate this Claim.

Respondents argue that Count Six of Villa Highlands' Second Amended Complaint for declaratory judgment was rendered moot after the summary judgment motions were decided in this case. (Respondents' Brief at 26). Respondents go on to argue, essentially, that the district court made comments that Villa Highlands' declaratory judgment claim would be concluded once the appraisal process was completed and that this was somehow binding on Villa Highlands. (*See* Respondents' Brief at 27). Villa Highlands is unable to find support for any of the citations to the record noted on page 27 of Respondents' brief.[4] However, in any event, even if the district court made casual comments about its understanding of the conclusion of Villa Highlands' declaratory judgment claim, it made numerous other comments that reflected that: (1) Villa Highlands' claim was not fully determined; (2) that Count Six would be tried to the Court and not the jury; and (3) that Count Six would be determined only after the appraisal process took place in this case. (*See* R. Vol. II, p. 282 at ¶ 4; *see* Tr. April 16, 2008, p. 61, L. 13-25, p.

[4] It appears that perhaps Respondents are working from a different set of Reporter's transcripts than Villa Highlands on appeal as the page numbers cited by Respondents do not match the page numbers for the respective transcripts that Villa Highlands is using on appeal.

62, L. 1-6; Tr. April 28, 2008, p. 238, L. 13-25, p. 239, L. 1-2; Tr. April 16, 2008, p. 61, L. 13-25l; R. Vol. II, p. 282, ¶ 4).

Again in this case, the district court entered an order stating that Count Six was "To be determined" after the appraisals were completed. (R. Vol. II, p. 282 at ¶ 4). Thereafter, the parties and the district court discussed that Villa Highlands' declaratory judgment claim would be tried before the court, not the jury, and that this claim had not been fully adjudicated. (*See* Tr. April 16, 2008, p. 61, L. 13-25, p. 62, L. 1-6; Tr. April 28, 2008, p. 238, L. 13-25, p. 239, L. 1-2; R. Vol. II, p. 282, ¶ 4). Villa Highlands believed that its declaratory judgment claim would be further adjudicated before the district court after the jury trial concluded, and the record supports this understanding.

Respondents next argue that Villa Highlands stipulated to the amount of damages at trial and asserted that it was not contesting the appraisal process at trial and thus, Villa Highlands agreed with the outcome of the appraisal process. However, Respondents' arguments are misleading. The stipulated amount of damages at trial had nothing to do with any number that came from the appraisal process. Rather, the damages at trial were determined by the amount of Villa Highlands' loss, $3,967,157 (which was stipulated to per the terms of the Stipulation entered on January 17, 2008), minus the amount that Villa Highlands had been paid to date by Western Community, $ 3,127,207. (*See* Tr. May 5, 2008, p. 10, L. 9-25, p. 11, L. 1-15; *see also* COE 7, Ex. B and C, p. 2 ¶ 2; and Aug. R. Order on Defendant Western Community's First Motion in Limine at 2-3, ¶ 5). The appraisal clause language in the builder's risk policy contemplates that if there is a disagreement regarding *either* the value of the property *or* the amount of the loss, a written demand may be made for an appraisal of the loss. (COE 6, Ex. A. at 4 of 7, ¶ E.2.) (COE 6, Ex. A). Thus, two calculations are contemplated: the amount of the

loss and the value of the building. The calculation of the *loss* was conducted by Western Community and there was no dispute concerning that *figure*. (*See* COE 7, Ex. C and COE 11, Ex. A). The value of the loss had nothing to do with the value of the building on the date of completion or the appraisal process in this case. The value of the building upon the date of completion, however, remained hotly contested and was attempted to be determined through the appraisal process. Thus, it is simply misleading and inaccurate to state that the damages sought at trial had anything to do with the value of the building upon the date of completion that emerged from the appraisal process.

Moreover, Villa Highlands was prohibited from offering evidence, argument or inference regarding the appraisal process at trial, other than referencing that it occurred. (Aug. R. Order on Defendant Western Community's First Motion in Limine at 2-3, ¶ 3). The district court entered an order on the first day of trial that stated:

> ...Plaintiff may not offer any reference or inference to Western Community's adjustment of the loss which tends to cast the manner in which Western Community did anything improper in the investigation or adjustment of the loss. Further, since the adjustment process is ongoing due to the parties' current participation in the appraisal process, Plaintiff may not offer evidence, argument, or inference regarding the appraisal process, other than it occurred. *Plaintiff also may not offer evidence or infer that Western Community took an inconsistent position during the adjustment process, incorrectly determined the value of the building upon the date of completion by utilizing fair market value or otherwise delayed or improperly paid Plaintiff's claim.*

(Aug. R. Order on Defendant Western Community's First Motion in Limine at 3, ¶ 3) (emphasis added). In light of the language of this Order, it is perplexing why Respondents continue to argue that the trial somehow dealt with the appraisal process, since Villa Highlands was prohibited from making any reference to the process, other than stating that "it occurred." The purpose of the appraisal process was not to determine Villa Highlands' damages at trial, but to

determine Western Community's liability under the policy, which Villa Highlands was precluded from pursuing in light of the district court's prior rulings in this case. Similarly, there was no need for Villa Highlands to challenge the appraisal process *during* the trial since: (1) the appraisal process was not at issue in the trial; and (2) Count Six was still pending and claim was to be determined by the district court, not the jury.[5]

Respondents also criticize Villa Highlands for stating that it was not contesting the appraisal process for purposes of the trial. (Respondents' Brief at 32). However, as set forth in the record, Villa Highlands did inform the district court that it reserved its right to contest the appraisal process on appeal. (Tr. May 5, 2008, p. 7, L. 7-12). This statement was made because the appraisal process was not at issue at trial and Count Six was still pending. In addition, given the district court's pre-trial rulings, Villa Highlands had already made its intentions known that regardless of the outcome of the trial, this case would be appealed and Villa Highlands ensured that no argument could be made that it in anyway waived its right to challenge the appraisal process at a later point in time. (*See* Tr. April 28, 2008, p. 193, L. 10-17). Further, Villa Highlands' statement in this regard did not bar its ability to pursue its declaratory judgment claim after the trial but before any appeal.

Respondents finally assert a half-hearted argument that Villa Highlands is attempting to raise an issue on appeal that was "never raised before the trial court" with respect to the appraisal process and criticize Villa Highlands for not confronting the appraisal process prior to the close of trial. (Respondents' Brief at 31 and 33). These arguments are entirely unfounded. Villa

[5] Villa Highlands would also once again note that the Judgment dismissing Count Six was submitted to the district court just days following the jury trial in this case, was signed, over Villa Highlands' objection, nine days after the jury trial concluded in this case, and was filed fourteen days after the jury trial. (R. Vol II, pp. 288 and 296-298). Thus, any criticisms of Villa Highlands for failing to adjudicate Count Six within this two week period are not reasonable.

Highlands raised, briefed, and argued the district court's dismissal of Count Six and the merits of the appraisal process in its Motion for Relief from Judgment, to which Western Community responded. (*See* Aug. R.). Respondents cite no authority which stands for the proposition that only motions or claims raised before the close of trial can be raised on appeal. If this were the law in the State of Idaho, then no litigant could ever appeal an order on a motion for relief from judgment or a judgment notwithstanding the verdict, or any other post-trial order or ruling.

1. The District Court Erred in Dismissing Count Six by Signing the Judgment in Favor of Western Community and Erred in Denying Villa Highlands' Motion for Relief from Judgment.

For purposes of brevity, Villa Highlands incorporates herein its arguments made on pages 24 through 36 of Appellant's Opening Brief, which were in large part not responded to by Respondents. In summary, the district court had no discretion to dismiss Count Six when it signed the Judgment in favor of Respondents because no applicable motion, proceeding, or stipulation was before the court to dismiss this claim. (*See* I.R.C.P. 12, 41, 56). In addition, there were unique and compelling circumstances justifying Villa Highlands' Motion for Relief from Judgment and justiciable controversies remained with respect to Villa Highlands' claim for declaratory judgment that had not been fully adjudicated. *See Harris v. Cassia County*, 106 Idaho 513, 516, 684 P.2d 988, 991 (1984). For these reasons, the district court erred in dismissing Villa Highlands' claim for declaratory judgment in Count Six and the district court's decision should be reversed.

Respondents also essentially argue that Villa Highlands is not entitled to challenge the appraisal process pursuant to the terms of the policy and further assert that because Villa Highlands did not attack the appraisal process prior to the close of trial, it was forever precluded

from challenging the appraisal process.[6] (*See e.g.* Respondents' Brief at 34-35). However, Respondents cite to no authority that supports these arguments. The appraisal process was to be determined after the appraisals took place in this case, which occurred the night before trial, and the appraisal process was to be determined by the district court, not the jury. Count Six was still pending after the jury trial concluded and Villa Highlands should have been permitted to fully adjudicate its claim for declaratory judgment.

Moreover, notwithstanding the use of the word "binding" in the appraisal clause of the builder's risk policy, courts in other jurisdictions have held that determinations made pursuant to these types of clauses are still reviewable and can be set aside. *See Central Life Ins. Co. v. Aetna Casualty & Surety Co.*, 466 N.W.2d 257, 260 (Iowa 1991) *and Wells v. American States Preferred Ins. Co.*, 919 S.W.2d 679, 683 (Tex. Ct. App. 1996) *and Quinn v. New York Fire Ins. Co.*, 126 N.W.2d 211, 213-14 (Wis. 1964). For the reasons set forth in Appellant's Opening Brief, the district court should have set the "umpire's" determination aside and should have granted Villa Highlands' Motion for Relief from Judgment. The district court's refusal to do so was in error and its decision should be reversed.

C. The District Court Violated Rule 11(b)(3) and the Circumstances Surrounding Davison Copple's Withdrawal Warranted Vacating the Trial.

Respondents argue that the district court properly exercised its discretion in denying Villa Highlands' motions to vacate the trial because, had they been granted, prejudice would have

[6] Respondents also argue, essentially, that Villa Highlands put all of its "apples" in one basket by asserting only a negligence claim against Dale Zimney at trial, lost at trial, and is now attempting to revise its litigation strategy through this appeal. (*See* Respondents' Brief at 36). This comment is misleadingly convenient. Villa Highlands was precluded by the district court's pre-trial rulings from pursuing any direct claims against Respondents at trial, which was not Villa Highlands choice or "strategy." Had the district court not dismissed Count Four of the Second Amended Complaint, this claim would have been tried before the jury in this case.

resulted to Respondents.[7] (Respondents' Brief at 39). Respondents also argue that Villa Highlands was really aimed at "re-start[ing]" the litigation which should not have been permitted. (*Id.*) Respondents' arguments are once again non-responsive to the controlling authority on this issue.

Idaho Rule of Civil Procedure 11(b)(3) states in relevant part:

> Rule 11(b)(3). Leave to withdraw - Notice to client.
> If an attorney is granted leave to withdraw, the court shall enter an order permitting the attorney to withdraw and directing the attorney's client to appoint another attorney to appear, or to appear in person by filing a written notice with the court stating how the client will proceed without an attorney, within 20 days from the date of service or mailing of the order to the client. After the order is entered, the withdrawing attorney shall forthwith, with due diligence, serve copies of the same upon the client and all other parties to the action and shall file proof of service with the court. The withdrawing attorney may make such service upon the client by personal service or by certified mail to the last known address most likely to give notice to the client, which service shall be complete upon mailing. *Upon the entry of an order granting leave to an attorney to withdraw from an action, no further proceedings can be had in that action which will affect the rights of the party of the withdrawing attorney for a period of 20 days after service or mailing of the order of withdrawal to the party.*

I.R.C.P. 11(b)(3). The motion for leave to withdraw as counsel was granted on March 12, 2008 and Villa Highlands was given 20 days from March 13, 2008 to obtain new counsel. (R. Vol. II, pp. 224-225). Over the next 20 days, the district court did not toll the deadlines for Villa

[7] Respondents argue that this prejudice was expressed through the district court's comment on March 12, 2008 that if it reset the trial it would be in one year, which was not fair to defendants. (Respondents' Brief at 39 and Tr. March 12, 2008, p. 4, L. 7-12). However, notwithstanding that fact that an alternate judge could likely have heard the matter sooner, this is not the reason why the court denied Villa Highlands' motion to vacate the trial. As set forth by the district court on April 9, 2009, the court found that six weeks was an adequate time to prepare the case for trial and that the associate on the case from Perkins Coie had previously worked on this case. (Tr. April 9, 2008, p. 125, L. 14-20). However, again, as set forth in Appellant's Opening Brief, the district court violated Rule 11(b)(3) and given the timing of Davison Copple's withdrawal at the state of proceedings that it withdrew, a vacation of the trial date in this matter was justified and should have been ordered.

Highlands' opposition to the Defendants' motions for summary judgment, but instead left the time ticking so that when Perkins Coie entered an appearance in the case on March 21, 2008, it had three business days to organize, digest, and analyze the entire case and thereafter draft opposition briefing and affidavits in response to the pending motions. (*See* COE 14). No proceedings were permitted to take place in the 20 days following the service of the order allowing the withdrawal, and when the district court failed to toll the summary judgment deadlines it failed to comply with the rules governing withdrawal.

In addition, the circumstances surrounding the timing of Davison Copple's withdrawal also warranted the district court vacating the trial and extending the deadlines in this case and the district court's refusal to do so deprived Villa Highlands of a fundamentally fair trial.[8] *See e.g. Lambert v. Northwestern Nat. Ins. Co.*, 115 Idaho 780, 769 P.2d 1152 (Idaho Ct. App. 1989). From the time that Davison Copple moved to withdraw until the time that Perkins Coie entered its appearance on behalf of Villa Highlands, the deadline to disclose rebuttal lay witnesses passed, Mr. Zimney's expert witness opinions were overdue, the deadline to depose lay witnesses had passed, the deadline to supplement discovery was days away, two opposition briefs and opposition affidavits in response to summary judgment motions were due in three business days, and counsel for Villa Highlands did not have sufficient time to prepare this complex case for trial. (COE 14, 19). The district court's rulings should thus be reversed.

D. Villa Highlands' Claim for Consequential Damages is not Moot.

Respondents argue that the district court properly refused to allow Villa Highlands to present evidence on its consequential damage claim because such information had not been

[8] At the very least, counsel for Villa Highlands should have been more careful not to make any statements that could potentially prejudice Villa Highlands or its case in the eyes of the district court when the motion for withdrawal was heard. This caution did not appear to have been exercised.

timely disclosed. (Respondents' Brief at 40). Villa Highlands has explained the circumstances surrounding the disclosure of its consequential damages in Appellant's Opening Brief, and incorporates those arguments herein for purposes of brevity. (*See* Appellant's Opening Brief at 40-42). Villa Highlands had moved for an extension to supplement its discovery in light of the timing of Davison Copple's withdrawal and its motion was not decided. Thereafter, Villa Highlands supplemented its discovery within the time frame that it has asked for an extension and the district court deemed the information untimely and the timing prejudicial to Respondents. When Villa Highlands brought the fact that Respondents had previously seen iterations of the very discovery that was supplemented thus causing no prejudice to Respondents, its argument was disregarded. The district court should have allowed Villa Highlands the opportunity to present evidence in support of its consequential damages at trial and its decision to the contrary was in error. The district court's decision should thus be reversed and remanded.

Respondents also argue that Villa Highlands' claim for consequential damages is moot because the jury in this case decided that Villa Highlands was not entitled to any damages. (Respondents' Brief at 40). Villa Highlands' claim for consequential damages is not moot. For the reasons set forth in Appellant's Opening Brief, the district court should have allowed Villa Highlands the opportunity to present its evidence on consequential damages to the jury and erred when it dismissed Count Four of Villa Highlands' Second Amended Complaint. (*See* Appellant's Opening Brief). Accordingly, if this case is remanded, the Court should reverse the district court's decision and allow Villa Highlands to pursue its claim for consequential damages against Western Community.

E. Villa Highlands Should have been Entitled to Pursue Discovery against Respondents.

Idaho Rule of Civil Procedure 26(b)(1) states that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the *claim or defense* of the party seeking discovery or to the claim or defense of any other party...." I.R.C.P. 26(b)(1)(emphasis). The information sought need only be "reasonably calculated to lead to the discovery of admissible evidence." *Id.*

Again in this case, the district court refused to allow Villa Highlands to obtain discovery from Respondents from two different sources. Villa Highlands moved to compel documents previously disclosed, but not provided, by Respondents and also moved to compel depositions that it recently scheduled prior to trial. (COE 33). The documents sought by Villa Highlands concerned, in part, the underwriting process with respect to the builder's risk policy at issue. (*Id.*). Villa Highlands also sought to depose the claims adjuster and attorney who handled aspects of Villa Highlands' claim and the 30(b)(6) representative of Western Community in order to obtain information related to Respondents' underwriting process and claims adjusting process. (COE 33). The district court refused to allow this discovery stating that the same was not "relevant." (Tr. April 16, 2008, pp. 64-95).

Respondents argue that Villa Highlands had a "full opportunity to conduct this discovery" and failed to pursue it.[9] (*See* Respondents' Brief at 42). Respondents' argument simply fails to substantively address the rules and case law governing discovery.

The discovery sought by Villa Highlands was reasonably calculated to lead to the discovery of admissible evidence in connection with the claims and defenses asserted in this

[9] It is again worth noting that the discovery deadline was not extended in this case, but the deadline to conduct depositions was extended. (Tr. April 9, 2008, pp. 127-128). The discovery deadline fell within the time frame that Davison Copple withdrew from this case. (COE 14, 19).

case. The underwriting of the policy and the investigation and handling of Villa Highlands' insurance claim were reasonably calculated to lead to the discovery of admissible evidence with respect to its negligence claims and its claim for declaratory judgment, which were still pending during the trial. Moreover, this information is discoverable as it relates to Count Four, which was improperly dismissed. The district court failed to apply the standard set forth in Idaho Rule of Civil Procedure 26(b)(1) and its refusal to allow this discovery was in error. The district court's decision denying this motion should thus be reversed and remanded.

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CERTIFICATE OF SERVICE

I, the undersigned, certify that on May 7, 2009, I caused a true and correct copy of the foregoing to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Rules of Procedure, to the following person(s):

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